

CALIFORNIA COASTAL COMMISSION

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W9e

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COASTAL DEVELOPMENT PERMIT APPLICATION

Application number3-03-072

Applicant.....Heron Crest Development

Project location.....660 & 666 Air Park Drive, Oceano, San Luis Obispo County (APN(s) 061-044-034 & 035).

Project descriptionConstruct three single-family residences of approximately 1,600 square feet each with 600 square foot attached garages, on three contiguous parcels of approximately 3,600 square feet each.

File documents.....Coastal Act; San Luis Obispo County Certified Local Coastal Program; CDP Application 3-99-054 (same project; withdrawn on 2/15/00); Botanical Report (Levine-Fricke-Recon, 1998); Wetland Delineation (JEN Ecological Services, 2000); Wetland/U.S. Waters Delineation (Olberding Environmental, Inc., 2003).

Staff recommendation ...Approval with Conditions

Summary: The applicant proposes to construct three 1,600 square foot single-family residences each with 600 square foot attached garages on three contiguous lots totaling 10,800 square feet. The project is located in the community of Oceano in south San Luis Obispo County. The site is within the Coastal Commission's permit jurisdiction by virtue of being located on historic tidelands associated with the confluence of Arroyo Grande Creek, Meadow Creek, and the Pacific Ocean. This area has been previously filled in order to build the Pismo-Oceano Airport and the surrounding neighborhood. The Coastal Act is therefore the standard of review. The County's LCP, however, may be used for guidance.

Prior to submitting the permit application, the project site was cleared of all vegetation and filled with few feet of soil. No permit was obtained for this work. All of the plants that once dominated the site are now gone, but previous surveys documented the presence of wetland indicators including hydrophytic



California Coastal Commission
December 2003 Meeting in San Francisco

Staff: JB-SC Approved by:

plants, hydric soils, and hydrology on the site. Recent development proposed in the adjacent environs, particularly to the south of the project site, have identified suitable habitat for sensitive wetland animal species. Therefore, under the Coastal Act the project is analyzed as new development within a wetland environmentally sensitive habitat area (ESHA). These wetlands, although substantially altered, would be considered ESHA under the Coastal Act because they include plant or animal life or their habitats, which are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.

The proposed new single-family dwellings are evaluated as new development on vacant lots that are entirely environmentally sensitive habitat area (ESHA). The project would result in direct and indirect impacts to wetland habitats. The project and the cumulative impacts to wetland habitats are considered significant and unavoidable. As proposed, impacts from residential use must be considered, and the structures and paving proposed on the site are inconsistent with Coastal Act Section 30240 because the entire site is considered to be environmentally sensitive habitat and residential use is not dependant on this resource. Although non-resource dependent development in wetlands (ESHA) is not consistent with the policies of Chapter 3 of the Coastal Act, some development of the site must be allowed in order to avoid a taking of the property without just compensation, as provided under Coastal Act Section 30010.

In light of constitutional takings issue associated with the proposed development, staff recommends the project be modified to maximize sensitive wetlands habitat protection consistent with private property rights. Therefore, staff recommends that the Commission **approve** the proposed development subject to a number of conditions in order to maximize consistency with the Chapter 3 policies of the Coastal Act. These conditions include the following requirements:

- Submittal of revised project plans;
- Placement of a conservation deed restriction on all open space/habitat areas;
- Submittal of an onsite wetland habitat restoration landscaping plan;
- Submittal of an offsite wetland mitigation plan;
- Submittal of drainage and erosion control plans;
- Archaeological monitoring during ground disturbing activities;
- Environmental monitoring during construction;
- Agreement to implement San Luis Obispo County Airport Review Area requirements;
- Submittal of final plans showing construction at a minimum of one-foot above the 100-year flood profile level;
- Assumption of Risk, Waiver of Liability and Indemnity;
- Implementation of specific measures to minimize temporary construction and cumulative impacts on wetland plants and animals.

As conditioned by this permit, the project will be consistent with Coastal Act Section 30010 and will adequately mitigate for unavoidable impacts to environmentally sensitive habitat. The project is also consistent with Coastal Act policies regarding hazards, archaeology, and public access.



Staff Report Contents

I. Staff Recommendation on CDP Application.....	4
II. Conditions of Approval.....	4
A. Standard Conditions.....	4
B. Special Conditions	5
III. Recommended Findings and Declarations.....	10
A. Project Description.....	10
1. Project Location	10
2. Project Description.....	10
3. Standard of Review/Basis of Decision	11
B. Issue Analysis	11
1. Environmentally Sensitive Habitat Areas.....	11
a. Applicable Environmentally Sensitive Habitat Area (ESHA) and Wetland Policies.....	11
b. Description of Sensitive Habitat	14
c. Implementing Sections 30010, 30233 and 30240 of the Coastal Act.....	15
d. ESHA Impact Analysis	17
e. Conclusion.....	18
2. Water Quality.....	19
a. Applicable Water Quality Policies.....	19
b. Consistency Analysis	20
3. Hazards	20
a. Applicable Hazard Policies	20
b. Consistency Analysis.....	21
4. Archaeology	22
a. Applicable Archaeology Policies.....	22
b. Consistency Analysis	22
5. Public Access	23
a. Applicable Public Access Policies.....	23
b. Consistency Analysis.....	23
6. Potential Violation	24
IV. California Environmental Quality Act (CEQA).....	24
V. Exhibits	
A. Project Vicinity and Locations Maps	
B. Site Photos	
C. County Approved Site Plans and Elevations	
D. County Findings and Conditions of Approval	
E. Revised Development Envelope	

I. Staff Recommendation on CDP Application

The staff recommends that the Commission, after public hearing, **approve** a coastal development permit for the proposed development subject to the standard and special conditions below.

Motion. I move that the Commission approve Coastal Development Permit Number 3-03-072 pursuant to the staff recommendation.

Staff Recommendation of Approval. Staff recommends a **YES** vote. Passage of this motion will result in approval of the coastal development permit as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

Resolution to Approve a Coastal Development Permit. The Commission hereby approves the coastal development permit on the ground that the development as conditioned, is consistent with the requirements of the California Coastal Act of 1976 (Coastal Act). Approval of the coastal development permit complies with the California Environmental Quality Act because either: (1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the amended development on the environment; or (2) there are no feasible mitigation measures or alternatives that would substantially lessen any significant adverse effects of the development on the environment.

II. Conditions of Approval

A. Standard Conditions

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the Permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. **Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the Permittee to bind all future owners and possessors of the subject property to the terms and conditions.



B. Special Conditions

1. **Final Plans.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Permittee shall submit two sets of Final Plans for the Executive Director's review and approval. The Final Plans shall demonstrate the following changes to the project:

- (a) **Development Envelope.** All development shall be confined to areas within the revised development envelope, as shown in Exhibit E.

- (b) **Open Space Area.** All areas outside of the development envelope, as shown in Exhibit E, shall remain in open space. All open space areas outside the development envelope shall be restored and revegetated consistent with special Condition 3 below. The open space area shall be clearly identified on the Final Project Plans.

The Permittee shall undertake development in accordance with the approved Final Project Plans. Any proposed changes to the approved Final Project Plans shall be reported to the Executive Director. No changes to the approved Final Project Plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is necessary.

2. **Open Space Restriction.**

- A. No development, as defined in section 30106 of the Coastal Act shall occur in the Open Space Area as described and depicted in an Exhibit attached to the Notice of Intent to Issue Permit (NOI) that the Executive director issues for this permit except for:

1. Restoration and landscaping activities conducted in accordance with the approved Wetland Habitat Restoration Landscaping Plan prepared for the subject property as required by Special Condition 3.
 2. Minor drainage improvements consistent with the objectives of the approved Wetland Habitat Restoration Landscaping Plan. "Soft" drainage improvements (e.g. earthen berms and/or vegetated swales) shall be favored and implemented where feasible.

- B. PRIOR TO ISSUANCE BY THE EXECUTIVE DIRECTOR OF THE NOI OF THIS PERMIT, the Applicant shall submit for review and approval of the Executive Director, and upon such approval, for attachment as an Exhibit to the NOI, a formal legal description and graphic depiction of the portion of the subject property affected by this condition, as generally described and shown on Exhibit E attached to this staff report.

3. **Onsite Wetland Habitat Restoration Landscaping Plan.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Permittee shall submit for the Executive Director's review and approval, two sets of Wetland Habitat Restoration Landscaping Plans for the entire lot outside of the building envelope designated as open space pursuant to Special Condition 1. The plan shall be prepared using California native plant species appropriate to the site. The plan shall include an analysis by a qualified expert that considers the specific condition of the site including soil, exposure, temperature, moisture, and wind, as well as restoration goals. At a minimum, the plan shall demonstrate that:

- (a) All vegetation planted on the site will consist of wetland plants native to California and

the Oceano area,

- (b) All required restoration landscaping shall be maintained in good growing condition throughout the life of the project, and whenever necessary, shall be replaced with new plant materials to ensure continued compliance with the restoration plan, and

The plans shall include, at a minimum, the following components:

- (a) A grading plan for removal of fill that shows the final contours of the site, after project grading, will support restoration efforts.
- (b) A map showing the type, size, and location of all plant materials that will be used, the irrigation system (if any), topography of the developed site, and all other landscape features, and
- (c) A schedule for installation of plants within the first growing season after completion of construction.

Grading to restore pre-fill site contours and installation of all plants shall be completed prior to occupancy. Within 30 days of completion of the landscaping installation, the Permittee shall submit a letter from the project biologist indicating that plant installation has taken place in accord with the approved enhancement plans and describing long-term maintenance requirements for the restoration. At a minimum, long-term maintenance requirements shall include site inspections by a qualified biologist annually, or more frequently, to identify and correct any restoration and maintenance issues. In addition, onsite landscaping installation shall be inspected and approved by the Executive Director.

Five years from the date of completion of the project, the Permittee or successors in interest shall submit, for the review and approval of the Executive Director, a restoration monitoring report, prepared by a qualified biologist, that certifies the on-site restoration is in conformance with the approved plan along with photographic documentation of plant species and plant coverage.

If the restoration monitoring report or biologist's inspections indicate the restoration landscaping is not in conformance with or has failed to meet the performance standards specified in the Wetland Habitat Restoration Landscaping Plan approved pursuant to this permit, the Permittee or successors in interest, shall submit a revised or supplemental restoration plan for review and approval of the Executive Director. The revised wetland restoration landscaping plan must be prepared by a qualified specialist, and shall specify measures to remediate those portions of the original plan that have failed or are not in conformance with the original approved plan. These measures, and any subsequent measures necessary to carry out the approved plan, shall be carried out in coordination with the Executive Director until the approved restoration landscaping is established to the Executive Director's satisfaction.

4. **Offsite Mitigation.** PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the permittee shall submit, for Executive Director review and approval, an Offsite Mitigation Plan for offsetting the permanent loss of 4,500 square feet of wetland area attributable to the project. The plan shall be approved by the Department of Fish and Game and shall identify an offsite mitigation site within Oceano on which 4,500 square feet of wetland habitat will be restored and permanently protected. The applicant shall submit with the Offsite Mitigation Plan a copy of a deed restriction, conservation easement, or other instrument acceptable to the Executive Director restricting the use of



the area for wetland habitat mitigation purposes, including monitoring. The plan shall include an analysis by a qualified expert that considers the specific condition of the site including soil, exposure, temperature, moisture, and wind, as well as restoration goals. At a minimum, the plan shall demonstrate that:

- (a) All vegetation planted on the mitigation site will consist of wetland plants native to California and the Oceano area,
- (b) All required mitigation landscaping shall be maintained in good growing condition, and whenever necessary, shall be replaced with new plant materials to ensure continued compliance with the offsite mitigation plan, and
- (c) The offsite area will support wetland mitigation efforts.

The plans shall include, at a minimum, the following components:

- (a) A map showing the type, size, and location of all plant materials that will be used, the irrigation system (if any), topography of the site, and all other landscape features, and
- (b) A schedule for installation of plants within the first growing season.

Within 30 days of completion of the wetland mitigation landscaping installation, the Permittee shall submit a letter from the project biologist indicating that planting has taken place in accord with the approved mitigation plan and describing long-term maintenance requirements for the mitigation area. At a minimum, long-term maintenance requirements shall include site inspections by a qualified biologist annually, or more frequently, to identify and correct any restoration and maintenance issues. In addition, offsite mitigation landscaping installation shall be inspected and approved by the Executive Director.

Five years from the date of completion of the project, the Permittee or successors in interest shall submit, for the review and approval of the Executive Director, a monitoring report, prepared by a qualified biologist, that certifies the wetland mitigation is in conformance with the approved plan along with photographic documentation of plant species and plant coverage.

If the mitigation monitoring report or biologist's inspections indicate the mitigation landscaping is not in conformance with or has failed to meet the performance standards specified in the Offsite Mitigation Plan approved pursuant to this permit, the Permittee or successors in interest, shall submit a revised or supplemental mitigation plan for review and approval of the Executive Director. The revised Offsite Mitigation Plan must be prepared by a qualified specialist, and shall specify measures to remediate those portions of the original plan that have failed or are not in conformance with the original approved plan. These measures, and any subsequent measures necessary to carry out the approved plan, shall be carried out in coordination with the Executive Director until the approved restoration landscaping is established to the Executive Director's satisfaction.

5. **Covenants, Conditions, and Restrictions (CC&R's).** PRIOR TO COMMENCEMENT OF CONSTRUCTION, the permittee shall submit two copies of the proposed CC&R's for the planned unit development. The CC&R's shall provide for the maintenance of landscaping and the Open Space Area, according to the Wetland Habitat Restoration Landscaping Plan.

6. **Fencing.** PRIOR TO COMMENCEMENT OF CONSTRUCTION, the permittee shall satisfy the following requirements:

- A. Plans for temporary exclusionary fences to protect trees and sensitive open space areas from disturbance during construction. Vehicle parking, storage or disposal of materials shall not be allowed within the exclusionary fences. Fences shall be installed prior to the start of construction and shall remain in place and in good condition until construction is completed. The exact placement of the temporary exclusionary fencing shall be identified on site by the project biologist. Either mesh field fence or snowdrift fence, or comparable barrier shall be used.

7. **Water Quality**

Drainage, and Erosion Control Plans. PRIOR TO ISSUANCE OF THE PERMIT, the applicant shall submit, for Executive Director review and approval, a drainage and erosion control plan that incorporates the following provisions:

Implementation of Best Management Practices During Construction. The Drainage and Erosion Control Plans shall identify the type and location of the measures that will be implemented during construction to prevent erosion, sedimentation, and the discharge of pollutants during construction. These measures shall be selected and designed in accordance with the California Storm Water Best Management Practices Handbook. Among these measures, the plans shall limit the extent of land disturbance to the minimum amount necessary to construct the project; designate areas for the staging of construction equipment and materials, including receptacles and temporary stockpiles of graded materials, which shall be covered on a daily basis; provide for the installation of silt fences, temporary detention basins, and/or other controls to intercept, filter, and remove sediments contained in the runoff from construction, staging, and storage/stockpile areas; and provide for the restoration of disturbed areas immediately upon conclusion of construction activities in that area. The plans shall also incorporate good construction housekeeping measures, including the use of dry cleanup measures whenever possible; collecting and filtering cleanup water when dry cleanup methods are not feasible; cleaning and refueling construction equipment at designated off site maintenance areas; any the immediate clean-up of any leaks or spills.

The plans shall indicate that PRIOR TO THE COMMENCEMENT OF GRADING, the applicant shall delineate that the approved construction areas with fencing and markers to prevent land-disturbing activities from taking place outside of these areas.

Post Construction Drainage. All runoff from the roof, driveway, decks, and other impervious surfaces shall be retained onsite to the greatest degree feasible. Runoff shall be captured and directed into designated pervious areas, percolation pits or appropriate storm drain systems. The drainage plan shall demonstrate that the pervious areas, percolation pits, or drainage systems are sized and designed appropriately to accommodate runoff from the site produced from each and every storm event up to and including the 85th percentile 24-hour runoff event. In extreme storm situations (>85% storm) excess runoff shall be conveyed off-site in a non-erosive manner and consistent with the objectives of the approved Wetland Habitat Restoration Landscaping Plan.

The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is required.



8. **Archaeological Monitor.** A qualified archaeological monitor and Native American representative approved by the Executive Director PRIOR TO THE COMMENCEMENT OF CONSTRUCTION shall be present during any construction or pre-construction activities that involve ground disturbance. Should archaeological resources be discovered at the project site during any phase of construction, the permittee shall stop work until a mitigation plan, prepared by a qualified professional archaeologist in coordination with interested Native Americans, is completed and implemented. Prior to implementation, the mitigation plan shall be submitted for review and approval by the State Historical Preservation Office and for review and approval by the Executive Director of the Commission. The plan shall provide for reasonable mitigation of the archaeological impacts resulting from the development of the site, and shall be fully implemented. A report verifying compliance with this condition shall be submitted to the Executive Director for review and approval, upon completion of the approved mitigation.
9. **Environmental Monitoring During Construction.** Permittee shall employ a project biologist/environmental monitor approved by the Executive Director to ensure compliance with all permit conditions and mitigation requirements during the construction phase. Evidence of compliance shall be submitted by the project monitor to the Executive Director each month while construction is proceeding, and upon completion of construction.
10. **Hazards - Airport Review Area.** The Permittee hereby agrees to San Luis Obispo County conditions 24 through 30 regarding Airport Review Area requirements (see Exhibit D).
11. **Hazards – Flood Hazard (FH) Area Combining Designation.** In addition to the requirements of the drainage plan (Special Condition 8), plans shall include base flood elevations, hazard areas, and floodway locations in the vicinity of the project in accordance with CZLUO Section 23.07.064. On the basis of the structural plans and depth analysis, the ground floor of all structures is to be constructed at a minimum of one-foot above the 100-year storm flood profile level. If no flood depth number is available, all structures shall be elevated a minimum of two feet above adjacent natural grade in accordance with CZLUO Section 23.07.066.
12. **Assumption of Risk, Waiver of Liability and Indemnity.** By acceptance of this permit, the applicant acknowledges and agrees (i) that the site may be subject to hazards from heavy storm damage, flooding, and earth movement; (ii) to assume the risks to the applicant and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and (iv) to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards.
13. **Compliance with Local Conditions of Approval.** All conditions of approval adopted by the San Luis Obispo County Planning Commission on December 7, 2001 (attached as Exhibit F) pursuant to an authority other than the Coastal Act continue to apply to the project (e.g., local conditions 3, 4, 5, 6, 14, 18, 19, 20, 21, 22, and 23).

14. **Deed Restriction.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit to the Executive Director for review and approval documentation demonstrating that the applicant has executed and recorded a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property (hereinafter referred to as the “Standard and Special Conditions”); and (2) imposing all Standard and Special Conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the Property. The deed restriction shall include a legal description of the applicant’s entire parcel or parcels. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this permit shall continue to restrict the use and enjoyment of the subject property so long as either this permit or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the subject property.

III. Recommended Findings and Declarations

The Commission finds and declares as follows:

A. Project Description

1. Project Location

The proposed development is located on the south side of Air Park Drive between Railroad and Palace Avenue in Oceano, San Luis Obispo County (see Exhibits A and B). The site consists of three contiguous parcels fronted by Air Park Drive. The project site is located in an area partially developed with residences and commercial structures. The area is zoned for multi-family residences while the current surrounding land uses are single-family residences and vacant lots. There are existing houses on either side of the project site. An undeveloped area is located directly behind and to the south of the project site. This undeveloped area contains existing riparian habitat in generally good growing condition. Mature willows are abundant within the contiguous alley right-of-way in the rear of the property.

2. Project Description

The Applicant proposes to construct an affordable housing planned unit development (PUD) consisting of three single-family dwellings of approximately 1600 square feet each with 600 square foot attached garages. The project is located on three existing parcels of approximately 3,600 square feet each totaling 10,800 square feet. Each of the three houses is proposed to be two stories with an attached garage, separate driveway, and trellised front porches. The total project includes approximately 6,600 square feet of buildings, 1,275 square feet of paving, and 2,925 square feet of landscaping.



3. Standard of Review/Basis of Decision

Jurisdiction

The site is within the Coastal Commission's permit jurisdiction by virtue of being located on historic tidelands associated with the confluence of Arroyo Grande Creek, Meadow Creek, and the Pacific Ocean, that were previously filled primarily in order to build the Oceano Airport. The Coastal Act is therefore the standard of review. Coastal Act policies include Section 30240, which prohibits any significant disruption of environmentally sensitive habitat areas, and bans those uses that are not dependent on such resources; and Section 30233, which limits the fill of wetlands.

In this case, the entire site of the proposed development is environmentally sensitive coastal wetland habitat (see finding B(1) below for details). Accordingly, because the proposed development is construction of three single-family residences (which are not resource-dependent uses or an exception under Section 30233) and will result in significant habitat disruption, the proposed residential development cannot be found consistent with Section 30240 and 30233. Therefore, absent other considerations, this project would have to be recommended for denial.

However, Coastal Act Section 30010 states:

The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefore. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.

The Coastal Commission is not organized or authorized to compensate landowners denied reasonable economic use of their otherwise developable residential property. Therefore, to preclude claim of takings and to assure conformance with California and United States Constitutional requirements, as provided by Coastal Act Section 30010, this permit allows for the construction of a residential development to provide a reasonable economic use of this property. This determination is based on the Commission's finding in B (1) of this staff report, below, that the privately-owned parcels were purchased with the expectation of residential use, that such expectation is reasonable, that the investment was substantial, and that the proposed development is commensurate with such investment-backed expectations for the site.

B. Issue Analysis

1. Environmentally Sensitive Habitat Areas

a. Applicable Environmentally Sensitive Habitat Area (ESHA) and Wetland Policies

The Coastal Act is very protective of sensitive resource systems such as wetlands, dunes and other environmentally sensitive habitat areas (ESHA). The Coastal Act defines environmentally sensitive areas as follows:

Section 30107.5. *"Environmentally sensitive area" means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in*

an ecosystem and which could be easily disturbed or degraded by human activities and developments.

Almost all development within ESHA is prohibited, and adjacent development must be sited and designed so as to maintain the productivity of such natural systems. In particular, Coastal Act Section 30240 states:

Section 30240(a): *Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.*

Section 30240(b): *Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.*

Article 4 of Chapter 3 of the Coastal Act also describes protective policies for the marine environment and specifically calls out wetland resources. Coastal Act Sections 30230 and 30231 provide:

Section 30230. *Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.*

Section 30231. *The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.*

In addition, Coastal Act Section 30233(a), 30233(c) and 30233(d) specifically address protection of wetland resources. In particular, Coastal Act Section 30233 limits development in wetlands to a few limited categories where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects:

Section 30233(a). *The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:*

- (1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.*
- (2) Maintaining existing, or restoring previously dredged, depths in existing navigational*



channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.

- (3) In wetland areas only, entrance channels for new or expanded boating facilities; and in a degraded wetland, identified by the Department of Fish and Game pursuant to subdivision (b) of Section 30411, for boating facilities if, in conjunction with such boating facilities, a substantial portion of the degraded wetland is restored and maintained as a biologically productive wetland. The size of the wetland area used for boating facilities, including berthing space, turning basins, necessary navigation channels, and any necessary support service facilities, shall not exceed 25 percent of the degraded wetland.*
- (4) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.*
- (5) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.*
- (6) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.*
- (7) Restoration purposes.*
- (8) Nature study, aquaculture, or similar resource dependent activities.*

Section 30233(c). *In addition to the other provisions of this section, diking, filling, or dredging in existing estuaries and wetlands shall maintain or enhance the functional capacity of the wetland or estuary. Any alteration of coastal wetlands identified by the Department of Fish and Game, including, but not limited to, the 19 coastal wetlands identified in its report entitled, "Acquisition Priorities for the Coastal Wetlands of California", shall be limited to very minor incidental public facilities, restorative measures, nature study, commercial fishing facilities in Bodega Bay, and development in already developed parts of south San Diego Bay, if otherwise in accordance with this division....*

In sum, the Coastal Act requires protection and preservation of significant habitat resources such as exist at the project site. Non-resource development within ESHAs is prohibited, only a very limited subset of development is allowed within wetlands (residential development is not one of the allowed types of development), and any development authorized must be mindful of the policies protecting the general wetland environs and its inhabitants.

While Coastal Act policies are the standard of review for coastal development, San Luis Obispo County's LCP also provides guidance to the Commission as it considers proposals for development in wetlands. With regards to environmentally sensitive habitat areas, the LUP contains the following relevant policies:

Policy 1 for Environmentally Sensitive Habitats: *New development within or adjacent to locations of environmentally sensitive habitats (within 100 feet unless sites further removed would significantly disrupt the habitat) shall not significantly disrupt the resource. Within an existing resource, only those uses dependent on such resource shall be allowed within the area.*

Policy 5 for Environmentally Sensitive Habitats: Coastal wetlands are recognized as environmentally sensitive habitat areas. The natural ecological functioning and productivity of wetlands and estuaries shall be protected, preserved and where feasible, restored.

CZLUO Section 23.07.170 – Environmentally Sensitive Habitats:

d. Development standards for environmentally sensitive habitats:

- 1) New development within or adjacent to the habitat shall not significantly disrupt the resource.*
- 2) New development with the habitat shall be limited to those uses that are dependent upon the resource.*
- 3) Where feasible, damaged habitats shall be restored as a condition of development approval.*
- 4) Development shall be consistent with the biological continuance of the habitat.*
- 5) Grading adjacent to Environmentally Sensitive Habitats shall conform to the provision of Section 23.05.034c (Grading Standards).*

b. Description of Sensitive Habitat

The proposed development is located on historic tidelands associated with the confluence of Arroyo Grande Creek, Meadow Creek, and the Pacific Ocean, that were previously filled in order to build the Oceano Airport and the surrounding neighborhood. All substantial undeveloped areas within this historically filled wetland represent environmentally sensitive habitat, in various stages of disruption or recovery. Clear evidence of the original wetland still exists at Oceano Lagoon, a wetland environmentally sensitive habitat area (ESHA) about one-quarter mile west of the project site. Oceano Lagoon is largely protected as part of Pismo State Beach and Oceano Lagoon County Park. While these areas are representative of the larger Oceano wetland complex that once existed, the extent of the wetland habitat in some areas is more difficult to determine due to the historic filling of the area during development of the airport and surrounding neighborhoods. The remnant wetland habitat areas have suffered severe impacts and in some areas are heavily developed. Potential wetland development throughout this area and the loss of habitat values in Oceano is a significant issue.

The property lies within a geographical area known for its occurrence of native plant and animal species restricted to wetland systems, including those listed as endangered or threatened under Federal and/or State regulations. Sensitive habitats are defined by local, State, or Federal agencies as those habitats that support special status species, provide important habitat values for wildlife, represent areas of unusual or regionally restricted habitat types, and/or provide high biological diversity. Because the wetland habitat ecosystem is a rapidly diminishing resource and is so easily disturbed, it is an acknowledged environmentally sensitive area. These coastal wetlands are communities designated as high priority in the California Department of Fish and Game (CDFG) Inventory. Coastal wetlands are also recognized as sensitive in the San Luis Obispo County's Land Use Plan.



In this case, the subject parcel was cleared of all wetland vegetation and filled with a few feet of soil.¹ The effect of this unpermitted work was an immediate loss of wetland habitat values on the project site and a masking of typical wetland indicators such as wetland vegetation and hydric soils. Although these wetland indicators may not currently be identifiable on the project site, prior to the removal of vegetation and fill, the entire site was characterized as wetland ESHA. Prior to disturbance, previous studies show the project site once contained hydric soils, wetland vegetation, and wetland hydrology. A botanical survey conducted on the site in October 1998 (Levine-Fricke-Recon) noted that 29 arroyo willow stumps were observed. To determine the tree canopy, or area that the trees covered before they were cut, the botanical report “assumed a 10-foot spread as the specimens in the adjacent area are small trees. A 10-foot diameter canopy relates to 78 square feet of cover per tree.” At 78 square feet per tree, the total canopy of the willow trees lost was approximately 2262 square feet ($78 \times 29 = 2262$), or about 20% of the entire project site. In addition, a number of plant species that usually, but not always, grow in and are indicative of wetlands, occur in the vicinity of and were identified on the project site at that time. These include smooth scouring rush (*Equisetum laevigatum*), salt rush (*Juncus lesuerii*), and Arroyo willow (*Salix lasiolepis*). A follow-up wetland delineation was conducted in June of 2000 (JEN Ecological Services, Inc.) to examine the vegetation, soils, and hydrology on the site and to determine if wetlands were present within the area of the proposed project. Even though the site had been seriously disturbed, the report concluded that the site “is a transitional wetland” that is “at the dry end of the moisture gradient for wetland communities.”

On January 10, 2003 a second wetland delineation was conducted for the project site (Olberding Environmental, Inc.). The analysis concluded that currently the project site does not contain wetlands, and is probably accurate. However, the analysis does not refer to any of the previous reports, nor does the current delineation recognize that the site was cleared of vegetation and filled. Contrary to conclusions presented in the most recently submitted wetland delineation, the whole area must be considered environmentally sensitive habitat, as it all has the potential to sustain the endangered and native plants associated with wetlands.

With after-the-fact type permit decisions such as this, the Commission assumes that the unpermitted work described above wasn't done. Thus, the proposed project area represents a significant natural resource providing biologically productive habitats for listed and non-listed plant and animal species, including important foraging, roosting, breeding, and rearing habitat. Accordingly, the entire project area constitutes wetland ESHA within the meaning of the Coastal Act and is analyzed as such.

c. Implementing Sections 30010, 30233 and 30240 of the Coastal Act

As described above, the entire area of the proposed project sites is environmentally sensitive wetland habitat. The proposed development as submitted includes three separate dwellings on three contiguous lots, with associated infrastructure improvements. This project will require approximately 100 cubic yards of additional fill material. The proposed project will result in a permanent loss of approximately 8,540 square feet of environmentally sensitive habitat (6,600 s.f. of buildings + 1,275 s.f. of paving + 665 s.f. of landscaping = 8,540 s.f.). This equates to roughly 80% of the total project site.

In addition to the permanent loss of wetland ESHA described above, disruptions will result from residential development and subsequent use of the site. Such activities may include: installation of a

¹ The exact timing of this development is unknown. Photographic evidence suggests that the project site was cleared of vegetation and filled with soil sometime between October 1998 and May 2000 (See Exhibit B).

storm drainage system, utility trenching, exterior lighting and, over the long run, ordinary residential activities on the premises such as allowing dogs or other activity in the habitat area. None of the development activity described is dependent on a location within the sensitive resource area. In addition, this development and its associated activities, individually and collectively, will result in a significant disruption of the environmentally sensitive wetland area onsite as well as surrounding the proposed project. Therefore, this project cannot be found consistent with Coastal Act Section 30240 or Section 30233.

Coastal Act Sections 30240 and 30233, however, must be applied in the context of other Coastal Act requirements, particularly Section 30010. This section provides that the policies of the Coastal Act "shall not be construed as authorizing the commission . . . to exercise [its] power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation." Thus, if strict construction of the restrictions in Section 30240 would cause a taking of property the section must not be so applied and instead must be implemented in a manner that will avoid this result.

Recent court decisions demonstrate that to answer the question whether implementation of a given regulation to a specific project will cause a taking requires an ad hoc factual inquiry into several factors. Specifically, the courts have consistently indicated that this inquiry must include consideration of the economic impact that application of a regulation would have on the property. A land use regulation or decision may cause a taking if it denies an owner all economically viable use of his or her land. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 112 S. Ct. 2886; also see *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 495, citing *Agins v. Tiburon* (1980) 447 U.S. 255, 260.) Another factor that must be considered is the extent to which a regulation or regulatory decision "interferes with reasonable investment backed expectations." (*Keystone Bituminous Coal Assn. v. DeBenedictis*, supra, 480 U.S. 470, 495, citing *Kaiser Aetna v. United States* (1979) 444 U.S. 164, 175.)

In addition, in order to avoid allegations of a taking, certain types of mitigation measures, such as exactions requiring the dedication of a fee interest in property, must be "roughly proportional" to the impact remediated. (*Dolan v. City of Tigard* (1994) 114 S. Ct. 2309.)

Other factors that may be reviewed in conducting a takings analysis include whether the land use regulation substantially advances a legitimate state interest. (*Nollan v. California Coastal Commission* (1987) 483 U.S. 825.) This is not a significant consideration in analyzing this permit application because the state's interest in protecting environmentally sensitive habitats is well recognized.

Finally, in still other individual cases it may be necessary to consider whether the property proposed for development by the applicant is subject to existing limitations on the owner's title, such as prescriptive rights, that might preclude the applied for use, or that the proposed use would be a nuisance. The question as to whether the any portion of the development is subject to prescriptive rights does not apply in this case. Furthermore, development of the parcel with a single-family residences in the configuration proposed by the applicant would not constitute a nuisance.

The Applicant (Heron Crest Development) submitted adequate financial information to demonstrate a sufficient real property interest in the privately held properties to allow some development. Staff has determined that the Applicant bought the three lots in 2000, for which fair market value was paid. During the period when the Applicant purchased the parcels, these parcels and other parcels in the Tract



were designated in the General Plan and zoned for multi-family residential use. Thus, in the year that the parcels were purchased, the Applicant could have legitimately assumed that development of multi-family homes on these lots was a reasonable expectation. Continued residential development on similar lots within the Oceano airport area over the intervening years lends further credence to that expectation. Therefore, in view of the other residential uses in the vicinity of the privately-held parcels, the Commission finds that the proposed residential use is a reasonable economic use, and also that the resource dependent uses allowed by Coastal Act Section 30240 would not provide an economic use.

In view of the findings that (1) none of the resource dependent uses provided for in Section 30240 would provide an economic use, (2) residential use of the property would provide an economic use and (3) the applicant had a reasonable investment backed expectation that such use would be allowed on the property, the Commission further finds that denial of a residential use, based on the inconsistency of this use with Section 30240 could constitute a taking. Therefore, consistent with Coastal Act Section 30010 and the Constitutions of California and the United States, the Commission determines that full implementation of Section 30240 to prevent residential use of the subject property is not authorized in this case.

Having reached this conclusion, however, the Commission also finds that Section 30010 only instructs the Commission to construe the policies of the Coastal Act, including Section 30240, in a manner that will avoid a taking of property. It does not authorize the Commission to otherwise suspend the operation of or ignore these policies in acting on permit applications.

Moreover, while the applicant may have reasonably anticipated that residential use of the subject properties might be allowed, the Coastal Act provided notice that such residential use would be contingent on the implementation of measures necessary to minimize the impacts of development on environmentally sensitive habitat. Thus, the Commission must still comply with the requirements of Section 30240 by protecting against the significant disruption of habitat values at the site, and avoiding impacts that would degrade these values, to the extent that this can be done consistent with the direction to avoid a taking of property. Mitigations must also be generally proportionate to the adverse impacts caused by development of residences and associated infrastructure.

d. ESHA Impact Analysis

As described previously, the entire area of the applicant's 10,800 square foot site is considered environmentally sensitive wetland habitat. Coastal Act Section 30240 allows only resource-dependent uses in ESHA. The proposed development includes construction of three single-family dwellings, paved driveways, and landscaping and thus is not a type of development that is dependent on a location within a sensitive resource area. As with other homes in Oceano, the proposed development will have on-going impacts on ecological functioning of the Oceano wetland area. Such impacts include covering and fragmentation of habitat, prevention of hydrological dynamics, shading of wetland plants, and the continuation of residential uses, which are inconsistent with protection of wetland habitat.

Proposed Project Results in Permanent ESHA Loss

As proposed, the project would permanently displace a portion of the site wetlands. The applicant has proposed to construct three single-family residences totaling roughly 80% lot coverage (6,600 s.f of buildings + 1,275 s.f of paving + 665 s.f. of landscaping = 8,540 s.f. of 10,800 s.f). In other words, sensitive wetland ESHA areas would be displaced to allow for residential development for the private benefit of the landowners. The proposed residential development is not a resource dependent use and

thus such permanent development within ESHA is inconsistent with Coastal Act Section 30240.

Proposed Project Results in Adverse Temporary Wetland and Other ESHA Impacts

In addition to the permanent loss of ESHA, the proposed project would result in temporary negative impacts to surrounding ESHA during construction. The staging of construction equipment onsite, site preparation, and overall construction activities and human presence are expected to adversely affect species and their habitat outside of the construction zone. Although direct construction impacts are expected to be temporary, such construction can have significant ESHA impacts on the short-term productivity of the affected habitat.

Furthermore, any residential development brings with it noise, lights, pets, and general activity that is not conducive to fostering habitat values. The lights that would be visible from the proposed residence at night might also have some impact on nighttime foraging and movement of species. Such impacts more than likely exist already due to the site's close proximity to adjacent residences and the Oceano airport. In this case, it is difficult to measure the extent of habitat disruptions from such activities. However, given the fact that the entire sight is ESHA, a precautionary approach is warranted.

e. Conclusion

The project site is an environmentally sensitive habitat area within the meaning of Section 30240 of the Coastal Act. This section of the Act requires that such habitat areas be protected against significant disruption or degradation. Strict application of this section is not authorized in this situation, however, because to do so would cause a taking of property in violation of Section 30010 of the Coastal Act, as well as the California and United States Constitutions. Therefore, the Applicant may be permitted to develop a portion of the property, subject to Special Conditions that will reduce or mitigate the impact on wetland habitat to the maximum extent feasible.

In order to maximize protection of the wetland habitat in light of constitutional takings issues, the project must be reduced in scope from that proposed, and conditioned as necessary to minimize disruption to sensitive habitat that would accompany any development of this property. Therefore, Special Condition 1 requires that the entire development envelope be reduced in size. Reducing the size of the development envelope would minimize site disturbance and have the effect of retaining a larger amount of area available for viable wetland restoration. Special Condition 1 requires a modified development envelope, reducing the development envelope of the overall project to 4,500 square feet (approx. 41% lot coverage) while at the same time orienting structures toward the fronting street, further from sensitive plants and drainage areas suitable to support wetland habitat.

In addition, appropriate mitigation for the impact to wetland habitat in Oceano includes the preservation of open space/habitat areas and restoration and long-term maintenance of these areas. Special Conditions 2 requires that the undeveloped area on the property shall be preserved in open space, subject to a deed restriction that prohibits uses that are inconsistent with habitat restoration and preservation. In conjunction with this requirement, Special Condition 3 requires that all open space areas outside of the designated building envelope be revegetated and restored. In 1993 the Commission approved a lot line adjustment between two parcels and the development of one single family dwelling on each parcel immediately to the east of the site of the present proposal (3-93-34). That site also had vegetation characteristics of wetlands, including willows. In that case, willows were proposed to be removed as part of the development. Permit 3-93-34 was conditioned to require a willow revegetation plan. More recently, the Commission conditionally approved a single-family residence in an area deemed wetland



ESHA less than one-quarter mile from the project site with the requirement for open space restoration and enhancement of all remaining undeveloped property (3-01-121, Bachman). Consistent with the approach, the conditions of this permit will help reduce the potential for adverse impacts to the environmentally sensitive habitat in the immediate project area as well as to minimize disruption to adjacent wetland habitat throughout the life of the development. These conditions shall run with the land in order to ensure that future owners are aware of the constraints associated with this site. Thus, special Condition 3 requires the applicants' biologist to submit a plan for the wetland restoration and enhancement component of the project. Special Conditions 6 and 9 require the development of a fencing plan and environmental monitoring during construction.

Furthermore, the San Luis Obispo County certified LCP allows for a 25-foot minimum front setback. As mentioned the LCP can provide guidance to the Commission when analyzing development proposals within wetland areas. The County approved an adjustment to the front setback under Section 23.01.044 of the CZLUO allowing the applicant a 10-foot front setback from Air Park Drive, which positions the development at the same setback distance of existing houses on the street. In this case, the rear of the property provides opportunity for re-establishing site connectivity with the greater wetland complex, as lands adjacent to the back of the property still contain mature willows and possibly other wetland characteristics. Moving the project towards the fronting street away from this area will limit adverse development impacts and assist in maximizing habitat protection. Thus, the Commission supports and retains the use of the County approved front setback adjustment for this purpose.

Mitigation is required to offset the temporary loss of 4,500 square feet attributable to the project's development envelope. Thus, Special Condition 4 requires mitigation in the form of an offsite wetland mitigation plan that would require the applicant to identify, in coordination with the Department of Fish and Game, an offsite mitigation site within Oceano on which 4,500 square feet of wetland habitat will be restored and permanently protected. The intent of this condition represents compensation for the disturbance area of the development, resulting in the permanent loss of wetland habitat areas. This mitigation is essentially, roughly proportional to the impact caused by the development.

Although the entire lot is considered to be ESHA, to prevent takings, some development of the parcel must be allowed. Only as conditioned does the project maximize the protection of sensitive coastal wetland ESHA, and satisfy Constitutional issues.

2. Water Quality

a. Applicable Water Quality Policies

Coastal Act Sections 30230, 30231, and 30232 provide:

Section 30230. *Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.*

Section 30231. *The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for*

the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

Section 30232. *Protection against the spillage of crude oil, gas, petroleum products, or hazardous substances shall be provided in relation to any development or transportation of such materials. Effective containment and cleanup facilities and procedures shall be provided for accidental spills that do occur.*

b. Consistency Analysis

The proposed project has the potential to degrade wetland habitat through the proposed construction of a three residences, altering natural drainage patterns, and contributing sediments and pollutants to coastal wetlands. Construction activities can adversely impact coastal water quality by causing erosion and sedimentation through the removal of vegetation and the movement of dirt. The increase in impervious surfaces that will result from the project will also impact water quality by altering natural drainage patterns and providing areas for the accumulation of pollutants that will eventually be carried into wetland areas by storm water. The proposed project would significantly increase the amount of impervious surface at the site due to the construction of a roof, driveway, and other hard improvements. The driveways, in particular, can accumulate automobile by-products contributing to polluted runoff (e.g., petroleum hydrocarbons, heavy metals such as lead, copper, zinc and cadmium, etc.).

Minimizing sedimentation and impervious surfaces resulting from new development is one way to reduce nonpoint source runoff. The primary mechanisms for minimizing impervious surfaces, in this case, are to require construction best management practices (BMP's) and reduce the size of the driveway. With less impervious area for pollutants to collect upon, there is a reduction in polluted runoff ultimately flushed off site. This can be accomplished by reducing the size of impervious surfaces and implementing erosion control BMP's during and after construction. Special Conditions 2 and 7 implement these requirements.

As conditioned, the Commission finds that the proposed project would maintain marine resource water quality; would not adversely impact wetland habitats; and, as such, is consistent with Coastal Act Sections 30230, 30231, and 30232.

3. Hazards

a. Applicable Hazard Policies

The following policies apply to the project due to the fact that it is located within an LCP designated Flood Hazard (FH) Area.

Section 30253 of the Coastal Act states:

New development shall: (1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard. (2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural



landforms along bluffs and cliffs.

In addition to the above referenced Coastal Act section, the County's Coastal Zone Land use Ordinance (CZLUO) also provides standards for development that is located within a designated Flood Hazard (FH) Area.

CZLUO 23.07.064- Flood Hazard Area Permit and Processing Requirements: *Drainage plan approval is required where any portion of the proposed site is located within a Flood Hazard combining designation, in addition to all other permits required by this title, state and federal law. In addition to the information called for in Section 23.05.042 (drainage plan required) the drainage plan shall include:*

a. Federal Insurance Administration flood data, including base flood elevation, flood hazard area and floodway locations.

b. In areas where weather service elevation data has no been provided by the Federal Insurance Administration, a normal depth analysis or other equivalent engineering analysis that identifies the location of the floodway and demonstrates to the satisfaction of the County Engineer that the structure will not be located within the floodway or be subject to inundation by a 100-year storm. The following information is required to determine the location of flood elevation and the floodway, except where waived or modified by the County Engineer:...

CZLUO 23.07.066 – Construction Standards: *New structures or an increase in 65 percent in the square footage of any existing structures (including manufactured homes) or other construction activities within a Flood Hazard Area combining designation are subject to the following:*

a. Construction, general:

(10) *On the basis of structural plans and the depth analysis, the ground floor of all structures is to be constructed at a minimum of one-foot above the 100-year storm flood profile level. Within any AO zone on the Flood Insurance Rate maps, this elevation shall be determined by adding on foot to the depth number specified. If no depth is specified, structures shall be elevated a minimum of two feet above adjacent natural grade.*

b. Consistency Analysis

Airport Hazards

Coastal Act Section 30253 requires that new development shall minimize the risks to life and property. The proposed development falls within the sphere of influence of the Oceano Airport Review Area. Therefore, the applicant is required to grant/update an Avigation Easement to the County of San Luis Obispo via an avigation easement document prepared by the County. The avigation easement document shall be reviewed and approved by the County Counsel prior to final approval. The County conditioned its approval to provide such an avigation easement (see Exhibit D, County Conditions 24-30). Special Condition 10 of this project approval retains these required measures. Thus, this aspect of the proposed development is consistent with the hazard policies of the Coastal Act.

Flood Hazards

Coastal Act Section 30253 requires that new development shall minimize the risks to life and property in areas of high geologic, flood, and fire hazard. In terms of coastal hazards, the project is located within

the Flood Hazard (FH) Area delineated by the San Luis Bay Coastal Area Plan, which generally corresponds to the area that is subject to flooding under a 100-year storm. In accordance with CZLUO Section 23.07.064, this coastal development permit requires the applicant to submit a drainage plan for Executive director review and approval (see Special Condition 7). In addition, Special Condition 11 requires that all CZLUO Flood Hazard (FH) Area permit processing requirements and construction standards be shown on project plans and implemented during construction.

In addition, the experience of the Commission in evaluating the consistency of proposed developments with Coastal Act policies regarding development in areas subject to problems associated with geologic instability, flood, wave, river, and/or erosion hazard, has been that development has continued to occur despite periodic episodes of heavy storm damage, flooding, landslides, or other such occurrences. Development in such dynamic environments is susceptible to damage due to such long-term and episodic processes. Past occurrences statewide have resulted in public costs (through low interest loans, grants, subsidies, direct assistance, etc.) in the millions of dollars. As a means of allowing continued development in areas subject to these hazards while avoiding placing the economic burden on the people of the State for damages, applicants are regularly required to acknowledge site geologic risks and agree to waive any claims of liability on the part of the Commission for allowing the development to proceed. Special Condition 12 requires the Applicant to recognize and assume the risk of building within an LCP designated Flood Hazard (FH) Area.

With these conditions, the project is consistent with Coastal Act Section 30253(1), which requires that new development minimize risks to life and property in areas of high geologic, flood, and fire hazard.

4. Archaeology

a. Applicable Archaeology Policies

Coastal Act Section 30244. *Where development would adversely impact archaeological or paleontological resources as identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.*

LCP Archaeology Policy 6 also provides guidance and states: *Where substantial archaeological resources are discovered during construction of new development...all activities shall cease until a qualified archaeologist knowledgeable in the Chumash culture can determine the significance of the resource and submit alternative mitigation measures.*

b. Consistency Analysis

The Oceano community is an area of identified archaeological significance in the LCP. An archaeological surface survey was conducted on September 30, 1998, by a qualified professional archaeologist. According to the archaeological report, the Oceano area has a number of archaeological sites “including one large site that was occupied for over 5,000 years.” Prior to conducting the filed survey, a records review was conducted which revealed, “no archaeological sites have previously been recorded within the area of the project site.” The field surface survey revealed no significant archaeological materials.

However, because the area in general is archaeologically sensitive, Special Condition 8 require a qualified archaeological monitor and Native American representative approved by the Executive Director to be present during construction or pre-construction activities that involve ground disturbance.



If archaeological resources are discovered at the project site during any phase of construction, work must cease until a mitigation plan, prepared by a qualified professional archaeologist in coordination with interested Native Americans, is approved by the State Historical and the Executive Director of the Commission. The plan must provide for reasonable mitigation of the archaeological impacts resulting from the development of the site, and be fully implemented. Only as conditioned is the project consistent with Coastal Act Section 30244.

5. Public Access

a. Applicable Public Access Policies

Coastal Act Section 30604(c) requires that every coastal development permit issued for any development between the nearest public road and the sea “shall include a specific finding that the development is in conformity with the public access and public recreation policies of [Coastal Act] Chapter 3.” The proposed project is located seaward of the first through public road. Coastal Act Sections 30210 through 30214 and 30220 through 30224 specifically protect public access and recreation. In particular:

***Section 30210:** In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

***Section 30211:** Development shall not interfere with the public’s right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.*

***Section 30212(a):** Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects...*

***Section 30223:** Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.*

b. Consistency Analysis

The Coastal Act requires that all projects proposed between the first public road and the sea be analyzed for compliance with the public access and recreation policies of the Coastal Act. Although there are several streets seaward of Air Park Drive, Air Park is the first through street nearest the beach. The project site is about one-half mile from the beach. Oceano Lagoon, Oceano Airport, and residential development lie between the project site and the beach. No access exists or is possible from the site to the beach other than along Air Park Drive because of the existence of these developments where public access is restricted. However, access is available within one-half mile of the site via Air Park Drive and Pier Avenue. At the seaward end of Pier Avenue is a public parking lot and direct beach access for public use. Therefore, no access is required to be provided by the current project. The Commission finds that the project is consistent with the public access requirements of the Coastal Act Sections 30211, 30212, and 30223.

6. Potential Violation

As discussed previously, the project site was cleared of all vegetation and filled with a few feet of soil. While the exact timing of this work is unknown, evidence suggests that it occurred sometime between December 1998 and May 2000. The Commission has been unable to locate coastal development permits authorizing the clearing and placement of fill on the project site and has opened a violation case file (V-3-03-051) and is investigating the alleged violation. The approvable project has been evaluated based upon acknowledged existence of the wetland ESHA on the project site.

Although this application has been considered based upon the policies of Chapter 3 of the Coastal Act, consideration of this application does not constitute an admission as to the legality of any development undertaken on the subject site without benefit of a coastal development permit and shall be without prejudice to the California Coastal Commission's ability to pursue any legal remedy available under Chapter 9 of the Coastal Act.

IV. California Environmental Quality Act (CEQA)

Section 13096 of the California Code of Regulations requires that a specific finding be made in conjunction with coastal development permit applications showing the application to be consistent with any applicable requirements of CEQA. Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The environmental review of the project conducted by Commission staff involved the evaluation of potential impacts to relevant coastal resource issues, including environmentally sensitive wetland habitat, water quality, hazards, and public access. This analysis is reflected in the findings that are incorporated into this CEQA finding.

The Coastal Commission's review and analysis of land use proposals has been certified by the Secretary of Resources as being the functional equivalent of environmental review under CEQA. This staff report has discussed the relevant constitutional coastal resource issues with the proposal, and has recommended appropriate mitigations to address adverse impacts to said resources. Accordingly, the project is being approved subject to conditions that implement the mitigating actions required of the Applicant by the Commission (see Special Conditions). As such, the Commission finds that only as modified and conditioned by this permit will the proposed project not have any significant adverse effects on the environment within the meaning of CEQA.

